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Changes to the PATRIOT Act in the Draft Conference Report Do Not Include Meaningful Safeguards for Civil Liberties; Some Even Make the Powers Worse

A summary document being circulated by supporters of the draft Conference Report on the USA PATRIOT Improvement and Reauthorization Act ("conference report") catalogues a series of changes made to the law. These changes do not include meaningful safeguards for civil liberties, and some changes even make the law worse from a civil liberties and privacy standpoint.

Point-by-point rebuttal:

Sunsets

1. Retains sunsets for only 2 of 16 Patriot Act provisions (and one of two expiring provisions in the 2004 Intelligence Reform Act). All the other intrusive powers are either made permanent or remain permanent, including the FBI's power to obtain "national security letters" (NSLs), secret records demands issued by an FBI official with no prior court oversight.
2. The seven-year sunset for the 3 provisions that are given sunsets:
    a. rebuff unanimous votes in both the House and Senate for a 4-yr. sunset period
    b. mean there will be no sunset review for the rest of President Bush's term and most of the first term of the next president

Section 206 (John Doe "roving wiretaps)

1. Continues to allow FISA wiretaps where neither the target nor the phone is identified; criminal wiretaps require one of the other
2. Does not include any requirement that the government determine that the target is near the phone to listen in; criminal wiretaps include this "ascertainment" requirement
3. Ten-day after the fact notice requirement is no substitute for privacy safeguards in criminal wiretaps

Section 213 (sneak-and-peek searches)

1. Still allows secret searches of a person's home or business to remain secret indefinitely
2. 30-day presumptive time limit (and an unlimited number of 90-day renewals) far exceed the customary 7-day limit that was imposed by federal courts before the Patriot Act
3. Loophole: even these long time limits can be waived in any case if the government shows that "the facts of the case justify" a longer period
4. Preserves vague "catch-all" standard allowing delays for an "adverse result" including jeopardy to an ongoing investigation

Section 215 (secret court orders for library, medical, other personal records)

1. **The bill does NOT adopt the Senate language – which was supported by Chamber of Commerce, conservative, library, civil liberties organizations – it rejects it.** It is much closer to the meaningless House standard:
   a. No requirement connecting private, personal records to a foreign terrorist or spy
   b. new "presumption of relevance" makes it easier to get records if there is such a connection, but it is still just as easy as it is now to get records of innocent people who aren't connected to terrorists
   c. "minimization" standards have been watered down so there is no requirement of a connection to a foreign terrorist or spy to retain information
2. Right to judicial review could prove illusory:
   a. Recipient must challenge before pre-selected group of 3 FISA court judges
   b. Government may make unlimited use of secret evidence in resisting a challenge
   c. Standard for challenge is only whether the order is lawful; FISA court still lacks discretion to suppress on any other ground
   d. Recipient must go to expense of hiring a lawyer with a security clearance who the FISA court agrees can appear before it
3. The "grand jury" standard is seriously compromised by language that says the government may use these orders to obtain **privileged information** (such as attorney-client communications)
4. No express right to challenge secrecy order

National Security Letters ("NSLs")

1. Creates a **new crime** of unauthorized disclosure of an NSL, creating more leak investigations.
   a. Any knowing disclosure – even if made with no intent to obstruct the investigation – could be punished by up to 1 year in prison. Today, there is no explicit penalty.
   b. Reporters could be subpoenaed and forced to reveal confidential sources if they learn about an NSL – something that cannot happen now.
2. No requirement connecting private, personal records to a foreign terrorist or spy
3. No minimization requirements – only a "study" of such requirements. With 30,000 NSLs a year, further study is not needed.
4. No sunset – NSLs remain permanent.
5. Allows government to get a court order, requiring a business or person to hand over records or face jail time for contempt of court, transforming national security letters into national security subpoenas.
5. Right to challenge secrecy of gag order is illusory:
   a. Government has unlimited right to keep records order secret indefinitely

b. Court must accept government's statement that disclosure of order would harm national security as **conclusive** – an unconstitutional interference with the court's right to review whether government's interests are compelling enough to outweigh recipient's right to speak out.